Brief 2

Supreme Court of the U. S.

525, 526—Cross Appeals.

HENRY R. JACKSON, ET AL.

vs.

NORTH LOUISIANA AND TEXAS RAILROAD COMPANY, J. T. LUDELING, ET AL.

Appeals from the Circuit Court of the United States for Louisiana.

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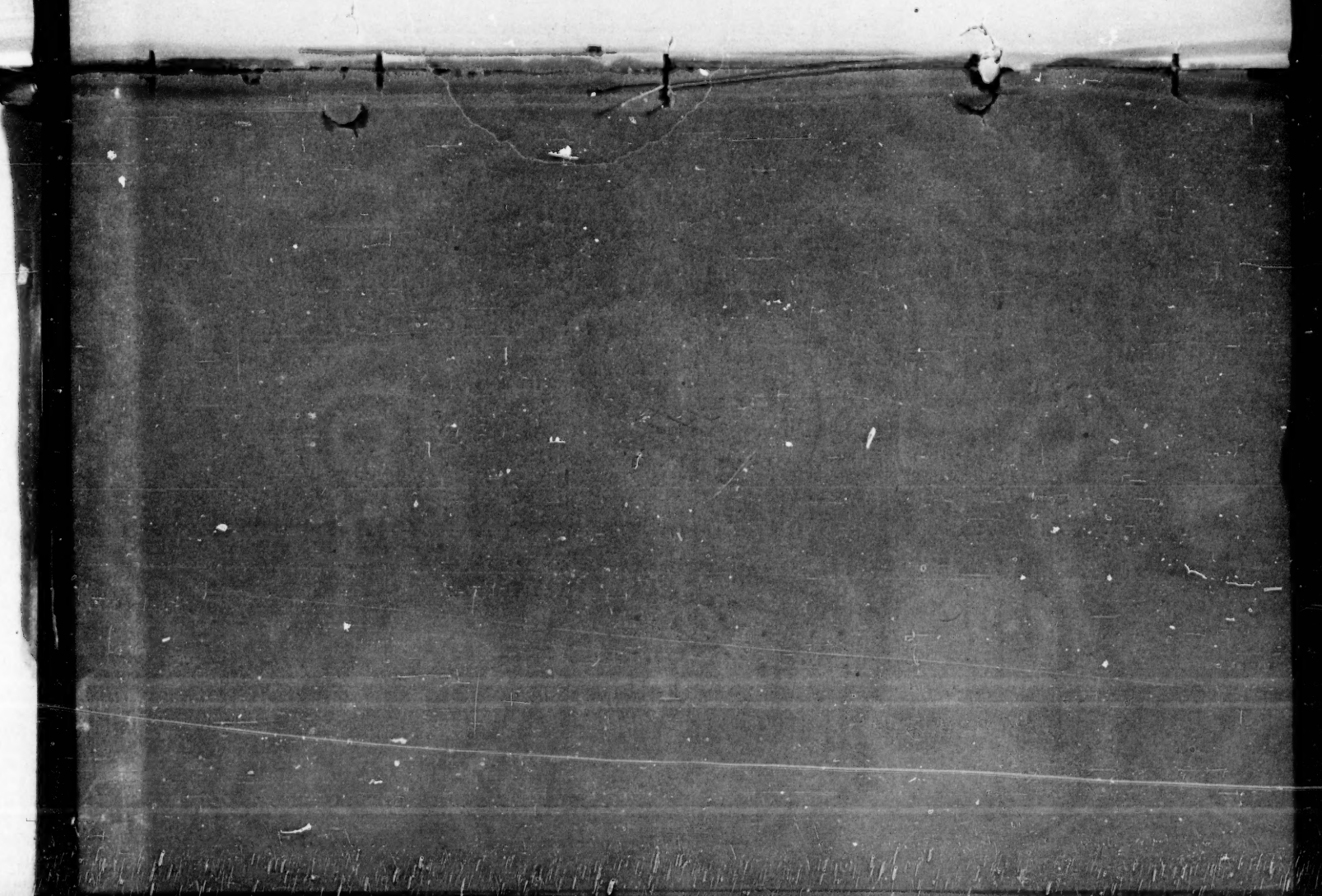

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I.

STATEMENT OF THE FACTS.

These appeals return to this Court the record and proceedings in the Circuit Court, subsequently to its receipt of the mandate of this Court in this cause, which cause was heard here, and is reported under the title of Jackson vs. Ludeling, 21 Wall., 606. The Circuit Court recorded the mandate as the decree of that Court. It reïnstated the suit to the docket; the conveyance by the Sheriff of the parish of Ouachita to Ludeling and his associates, dated 5th February, 1866, of the property of the Vicksburg, Shreveport and Texas Railroad Company described in the bill was cancelled, and an injunction issued to the defendants to restrain any claim of right in the property, under that deed, by

them; a Receiver was appointed who took possession of the property; a Master was appointed to ascertain the amount of the debt arising upon the bonds validly issued under the mortgage of the corporation set out in the bill; the names of the creditors; the property to be sold and a proper mode of sale.

He was also required to state the account for the money or property received by the defendants from the property sold to them, and to conform to the directions of the decree. Record, pp. 1, 2. The decree of this Court is appended to this brief as Exhibit A, p. 45.

The Master made a special report of the amount of the debt as consisting of seven hundred and sixty-one bonds, with coupons thereon from September, 1863, and some coupons of an earlier date. This report was confirmed without exception. Certain bondholders filed objection and exceptions to a report of the Master which denied the validity of the bonds presented by them.

These exceptions are included in the Record, No. 156, of this Court.

The Master reported the property, subject to the mortgage, and the mode of sale, which reports were not opposed. The Master made special reports which embraced the subjects of the accounts for the receipts by the defendants from the earnings of the railroad and the sales of property, and the disbursements for maintenance and running expenses, and also in respect to the claim of payment for constructions and works made by them, on the land with their own materials, during the period of their occupation of the land.

These reports were the subject of exception by the plaintiffs, and the defendants in the suit. Record, p. 13, Master's report; order to recommit, p. 316; Master's report, 316; final order, 322; exceptions to first report, Record, p. 312–315; exceptions to second report, 319, 320. The reports contain a certificate of the matters contended for before him by the respective parties.

II.

THE DECREE OF THE CIRCUIT COURT STATED.

1. The decree declares that the property reported by the Master was subject to the payment of the debt he had reported to be secured by the mortgage of the Vicksburg, Shreveport and Texas Railroad Company, dated 1st of September, 1857, and due 1st September, 1877, with coupons of semi-annual interest of forty dollars each, being at the rate of 8 per cent. annually. The coupons from 1st September, 1863, and the half of March, 1863, till the maturity of the bonds, are unpaid. There were seven hundred and sixty-one bonds, of $1,000 each, issued.

2. The third section of the decree declares that the defendants had expended $488,109.54 on the property mortgaged for improvements, *which remain on the property ready to be turned over*, and on which they were entitled to interest from the date of the expenditure, at the rate of five per cent. per annum, till the appointment of a Receiver; 13th April, 1875.

That there was an excess of earnings over the running expenses and maintenance of $161,476 which the plaintiffs were entitled to, with interest from the receipt.

The Court deducted this sum from the amount of the allowance to the defendants, and found a balance for the defendants of $326,632.85. Four years of interest was allowed on this sum for the expenditures in improvements, making a total of $391,959.40 as the sum to be accounted for to the defendants, and to be raised in the manner set forth in the fifth section of the decree.

3. In the fifth section of the decree the Court directed all the property to be set up at the price of $833,098.38, the actual value thereof as shown in the report of the experts. (Record, p. 77, fol. 204); and if this, or a larger sum, were obtained, the sum of $391,959.40 was to be paid to the defendants in full, and

if the value above mentioned could not be obtained, the defendants were to have such a proportion of the sum obtained at the sale, as the expenditures bore to the upset price aforesaid.

4. The Court explains, in the fourth section of the decree, the doctrine of the dispositions specified in the third and the fifth sections. The Court, in the fourth, says that the claim of the plaintiffs to make any election on the subject of the removal, demolition or retention of the constructions and works made by the defendants was disallowed. That the plaintiffs were not the owners of the property within the terms of the 508th Article of the Code of Louisiana, and that it was not possible to remove some of the constructions, and that removal would be detrimental to the property and render it unfit for use. In the opinion made to explain the decretal order of 1876, (Rec. 316,) which is reported as Jackson vs. Ludeling, 2 Woods, 254, the Court overruled the claim of the defendants as *bona fide* possessors, and charged them with the fruits, and directed inquiries so as to make up a decree under the 508th Article of the Civil Code. In the decree made upon the coming in of the Master's report under that order, the Article 508, in so far as the rights of the plaintiffs as owners are involved, to keep or reject the constructions, was determined to have no application, and the claim reserved by the plaintiffs to elect was denied. The Court filed an opinion concurrently with the decree. (Record, 322, 329.)

III.

ASSIGNMENT OF ERRORS IN THE DECREE OF THE CIRCUIT COURT FOR APPELLANTS.

1. The appellants assign for error; the allowance made by the Court in the third section of the decree, of a sum of money as the principal, and a further sum as the interest thereon, being for expenditures made by the defendants on the property

included in the mortgage described in the decree of this Court and held by the receiver which remain thereon and are ready to be turned over, with interest on the expenditures from the date. The plaintiffs have never ordered the expenditures, nor consented to keep the constructions or works put upon the property, and are not chargeable with the same. That they were put upon the property by the defendants with notice of the *vices* of their title, as they have been declared and adjudged in the opinion and decree of this Court and the decree of the Circuit Court under its mandate, and that the defendants have no title to any allowance.

2. The plaintiffs assign for error: the denial by the Circuit Court to the plaintiffs of the rights of ownership and interest in the said property in the third, fourth and fifth sections of the decree and the charges made in those articles upon the property in favor of the defendants, as follows: 1st. In allowing the plaintiff the sum of money specified in section third for expenditures on the property without reference to their value or the acceptance of them by the defendants. 2d. By the allowance of interest thereon as not sanctioned by any law of Louisiana or rule of equity. 3d. The application of money found to be owing to the plaintiffs, to the payment of these sums. 4th. By the provision for the payment of the remainder out of the proceeds of sale.

3. The plaintiffs assign for error the refusal of the Court to allow a rent for the property occupied by the defendants and the refusal to enter a judgment against the defendants for the rents, profits and products of the estate.

4. The plaintiffs assign for error, the failure of the Court to overrule the claims of the defendants and to order a sale of the property under the decree of this Court discharged from any claim of theirs for ameliorations, or outlays on the same.

The plaintiffs pray that the decree of the Circuit Court be reformed and amended, and that such a decree be here entered,

as will direct the sale and distribution decreed in its former decree without claim from or allowance to the defendants—that the defendants pay all of the costs.

IV.

BRIEF OF THE ARGUMENT.

The decision of this Court, and the decree rendered here, required the defendants to make an entire restitution of all the property they had received under the sale, and the deed of the Sheriff of Ouachita parish, of the Vicksburg, Shreveport and Texas Railroad Company which had been declared to be illegal and void, as fraudulent. And besides this, to render a full account of the money or property arising from it. In this account as debtors, they were to receive such credits as the law of Louisiana or the circumstances justified.

The defendants surrendered the property of the corporation to a Receiver after a possession of nine years, two months and ten days. It had been the capital upon which, for their own profit, they had conducted an extended business of transportation as public carriers. They procured a charter in which they were incorporated, and all of the franchises, privileges, rights and property of the Vicksburg, Shreveport and Texas Railroad Company were declared to be vested in them as corporators, and to form a capital of six millions of dollars. They inserted in this charter a provision for the loan of State bonds, bearing 8 per cent. interest, at the rate of six thousand dollars per mile, for the whole length of the railroad, they to pay the interest and principal, and this obligation was secured by a second mortgage on the property, the power to make a dominant mortgage for $20,000 per mile being retained. In 1872 another Act was procured under which they sold eleven thousand two hundred shares of this stock out of the sixty thousand shares, for one million two hundred thousand of the bonds of the State, and thus discharged those second mortgages. Original Record, p. 295. Acts of 1868, No. 108; Acts of 1873, No. 97.

This corporation (North Louisiana and Texas Railroad Company) was managed by the defendants to this suit. Ludeling was President; Ray and Waddell, Vice Presidents; Gordon, Superintendent; Stubbs, Attorney, and McGuire, Secretary and Treasurer. The purpose of the decree of this Court was to grant to the plaintiffs "indemnity for the past and security for the future." The compulsory surrender of the property, the avoidance of the sale, and of the deed of the Sheriff, as fraudulent and void, and the cancellation of the documents of title, and the perpetual injunction against further molestation and claim, accomplishes the purpose of the decree as to future security. Indemnity for the past has not been obtained. This account is for adjustment. Indemnity, in the view of the Court, consists in replacing the suffering party in that lawful condition he would have been if the wrong had never been committed and the law made for his protection had not been violated. A moral and a legal wrong was committed by the defendants. Reparation is appropriate and necessary, otherwise delinquents will profit by wrong-doing, and a forced loan effected without any payment of interest.

V.

The law of Louisiana, in respect to the account to be made, is comprised in a few sentences. The fruits, products and profits from a thing, whether natural or civil, spontaneous or cultivated, belong of right to the owner, and the possessor must return them to the owner with the thing itself. All that he can expect as a credit are his *necessary expenses* in the preservation of the thing, or in rendering it productive.

C. C., 499, 500, 501, 502, 2312, 2313, 2314, 1934., sec. 2.

The exception from this law of property and responsibility is a single and "*peculiar*" one. "A right which is *peculiar* to a possessor in good faith," is "to gather for his own benefit the

fruits of the thing until it is claimed by the owner, without being bound to account for them except from the time of the claim for restitution." (C. C., 3453, 508.)

We are not dealing with persons who acted in good faith, and who were not apprized of the defects of their title, and upon whom no reclamations had been made, but with possessors in bad faith, under conditions of great aggravation.

The law allows us to claim all that come to the hands of these defendants, as products, fruits and revenues; all that they hindered or prevented the owners from receiving by prudent and discreet management on their part if they had not been disturbed; all that was not received by them from neglect or mismanagement; all deterioration and waste of the property.

C. C., 2314.

8 Pothier; de la Proprieté, secs. 344, 350.

6 Savigny, droit Romain, ch. 266, p. 109.

Strikes' Case, 1 Bland, 57; 4 Dana, 198.

Malhallen vs. Moran, 3 Dru. & W., 317.

VI.

The property which came to the hands of these defendants was a railroad and appurtenances, which had been properly constructed and was in good order until the year 1864, when a gunboat expedition visited the country through which the railroad passed, destroyed some of the bridges, depots and portions of the rolling stock and track and rendered it useless as a railroad for the remainder of the war, and until repairs could be made of this devastation.

The testimony shows that the extent of this damage has been exaggerated and that about fifteen per cent. of the cost of the railroad would have repaired the damage. The iron rails were but little injured and have been used from that date till now, without addition, and are in good order. The preparations for track-laying and the substructure remains and all of the ad-

ditions made by the defendants and remaining on the ground in market value in respect to the other property of the railroad are as 84 to 157. The defendants used as their own all of this property during the whole period of their possession; they transferred it to a corporation composed of themselves, converted it into shares, obtained loans, sold the shares of stock at extravagant prices, managed, controlled and enjoyed it. They paid themselves liberal contributions in salaries and for expenses. The plaintiffs claim that for this occupation, use, enjoyment, control of the capital of the plaintiffs they owe a fixed and certain rent.

The smallest calculation of actual capital possessed by them we fix at $800,000. At an interest of five per cent. there would be yielded as a rent annually, ...	$ 40,000 00
Nine years, two months and ten days. . . .	367,777 00
Interest for eight years, ...	73,555 40

The charge of a rent is the usual mode of dealing when the property remains in the possession of the defendants. The errors, insufficiencies and perils of the wrongdoer's management, is not visited on the owner. The consequences of fraud or evil intention can be more readily obstructed by such an assessment. The important aims to be attained or a just compensation to be rendered to the injured party and such an award as effectually to prevent the malefactors from reaping a profit from their iniquity.

VII.

THE ACCOUNTS AS RENDERED TO THE COURT AND THE ORDERS THEREON.

The defendants claimed they had held the property under a perfect legal title, in entire good faith until they were evicted by the decree of this Court in April, 1875. They were entitled, they

averred, to all the revenues, profits, products they had received until then, and also to payment for their constructions and works which had enhanced the value of the property; and besides to possession of the property till these had been paid for. (Record, 21, fol. 57.) They filed statements of account which are copied into the record. (Record, 142 to 299.) The master collected out of these statements certain results embodied in his report of January, 1876. (Record, 13, 14.)

1. The total earnings of the railroad and sales of property, ...	$939,124 61
2. Account for maintenance and running expenses,	777,647 72
3. Account commencing as *construction* and other items, ...	748,154 72
4. Account of interest (a balance) at 8 per cent., .	361,531 38

These accounts seemed to have been submitted on part of the defendants, to demand recognition from the Court that they were to have possession until they had been reïmbursed for all their outlays and expenditures as bona fide possessors; to support their denial of all accountability, and their demand for compensation and bounty.

The Master reported the contradictory claims of the parties to the cause and these statements. He says he did not pass judicially upon them. His object was, apparently, to have some definition from the Court of the principles on which he was to perfect it.

The Court made up a decretal order (Record, 316,) upon the hearing, and found that the defendants owed for the excess of earnings and receipts over the maintenance and running expenses, $161,476.69; with interest upon the receipts—this sum of interest as subsequently allowed in the decree is $32,295.53. This accounting was thus closed by an allowance to the plaintiffs of $193,772.69.

As a rent of the property, the sum so allowed would be about $18,000 annually.

VIII.

IS THIS SUM A PROPER INDEMNITY?

A proper inquiry is, what have the defendants done with this property and what revenues, profits, benefits, have they derived from it? We have already shown that they caused an incorporation of themselves to be made with an investiture of themselves, thus corporate, with the franchises, rights and property they had illegally acquired; they mortgaged and then sold less than one fifth for one million and two hundred thousand dollars of public securities; they managed the property as their own; the value of the property depended upon its speedy reparation; these defendants did not put it in suitable order for earnings for a number of years—five or six.

What was done was broken, interrupted, transient workmanship, that perished rapidly, and entailed a second and third time the same expenses. The accounts presented show a great excess of work and of materials to be attributed exclusively to the insufficiency of the means of the defendants to make the reparations or their indisposition to do so, and the consequent loss of interest on the capital the owners had invested upon the property. Nothing whatever was done to extend it beyond Monroe. Large salaries were paid to the defendants. The report of Greene and Richardson enables us to ascertain the value of the property they acquired, and what was done with it. After a careful and minute examination these experienced experts reports the present market value of the entire property upon a cash valuation to be $1,576,479.65.

Exhibit A, Rec. 67 to 76; summary, Rec. 76.

The Exhibit B is a minute and careful enumeration of all the defendants have placed upon it, and which remains on the ground. This sum is stated at $347,361.29. (Record, 45 to 52. Summary, Rec., 51.)

Whatever else that belongs to the property was placed there by the Vicksburg, Shreveport and Texas Railroad Company, and is worth $1,229,118.36.

This conforms to the testimony given at the first hearing by Wadley, Grant, Young, Swan and Horne. (Wadley's test., p. 60, of former Record; Grant's test., 100, 103; Swan's test., 108; Young, p. 95; Horne, 69.)

The iron rails were then valued at $500,000. They are estimated to be worth $258,000 now, after nine years' service and decline in prices. The defendants have purchased none. The two defendants, McGuire and Stubbs, estimate the property to be worth $2,000,000, and to be in better order than when it was first made. Gordon places the value at $1,500,000. (Record, 100, 94, 97.) All that can be found of materials and workmanship of the defendants is assessed at $347,361.29, and the difference between this latter sum and their estimates is what was seized, sold and occupied and exploited by the defendants above nine years. The testimony shows that the defendants deteriorated the iron rails to the amount of $49,000, and consumed and sold material upon the railroad amounting to $

The property could have been sold, in 1866, for one million of dollars to Brenner & Co. (Swan's dep., p. 110, fol. 375.) They actually bid at the sale $550,000 and were successful. The defendants bid $525,000. This property was taken from the owners under circumstances, and has been held under conditions, characterized by bad faith. A rental, based upon the smallest estimate of value which has been stated, or upon the bids made at the Sheriff's sale, made under the most unpropitious circumstances, would yield the sum of $30,000 annually. The amount we claimed was moderate and its allowance just, as a compensation for the property. Under the equitable action of trespass for *mesne* profits, such would be the verdict.

Adams on Eject., p. 391.

Sedgwick on Dam., 124.

Goodtitle vs. Tombs, 3 Wil., 118.

IX.

THE PLAINTIFF'S WRONGS STATED.

There was an arrearage of interest on the mortgage on the 3d February, 1866, amounting to $168,000. This default occurred during the war. No bondholder was clamorous or hostile. There was consultation and coöperation with a view to a reorganization and reconstruction of the corporation, and general consent obtained. Defendant Gordon at this time purchased from Secretary and Treasurer McGuire, four bonds with unpaid coupons amounting to $720 on them, at the price of $160 a bond. With these securities and a supply of malice, covetousness and mischief, late in the year of 1865, he started this suit with associates.

The stock of securities has been but little enlarged. The North Louisiana and Texas Railroad Company appeared before the Master with the four bonds that Gordon had used in his suit—with four other bonds which probably were derived from Vice President Bry and Secretary McGuire, one or both. The account of this company is for their bonds, coupons and interest on coupons, $18,739.

Horne, who was seduced into a breach of trust to make his combination with Ludeling and associates, brings his twenty-three bonds and proves a claim upon them for principal and interest of $54,793. Stubbs has a single bond. The bonds and coupons which Ludeling produced to support their sale have been restored to their owners and are proved here by parties who have prosecuted this suit.

None have "clubbed funds" or purposes with the original defendants. The mortgage debt, which was $168,000, and exigible in 1866, is now above two millions of dollars. The seven hundred and sixty-one bonds became due in 1877, with all of the coupons maturing since February, 1866. Interest has been

accumulating on interest. Not a holder of bonds, unless it be Gordon, Superintendent; McGuire, Secretary and Treasurer; Bry, and Stubbs, and Horne, have had a dollar of advantage from this property since 1866. These defendants, unless Horne be an exception, have all the time been feeding at the treasury of the associates or their corporation. Nor have the associates been famished during this period. The statements we have drawn from the record of the former suit, and the testimony in this record, establish the magnitude of the speculation these defendants attempted, and the pernicious consequences to those upon whom they practiced. This property, in the hands of the bondholders and stockholders of the Vicksburg, Shreveport and Texas Railroad Company, under the administration of the respectable and responsible men that are found among this body, in all probability would have been completed, and formed a valuable portion of the highways of communication in this country.

As it is the principal result that will be obtained—and that result is not to be undervalued—nay, cannot be overestimated—is the sentence of condemnation and punishment that follows those who, by faithlessness to trusts and to confidence reposed, wrest, by the forms of law, from the uninformed and confiding, their just rights, by the commission of a great moral and legal wrong, when brought, according to the forms of law, for judgment in this Court.

PART II.

I.

THE QUESTION AS TO AMELIORATIONS.

The claim of a possessor. who has made constructions and works upon the property of another, for compensation for them, stands upon an entirely different footing from that we have examined in respect to an account for products, revenues, and for indemnification because of loss on the part of the owner. It is the faculty of production and reproduction which gives to property its principal,. and, sometimes, its only value, and the motive for its acquisition.

The owner, under the law, acquires these products, fruits and revenues as incident to his ownership and by the same right.

The claim for compensation for constructions and works placed upon the land of another during a *bona fide* or an illegal and *mala fide* occupation by a possessor, is the claim of an owner of materials and workmanship on the one part, upon the owner of the land on the other part. In the settlement of these claims, the matter of fact whether the possessor be a possessor in good faith or a possessor in bad faith, is one of primary importance. The defendants in this cause came before the Master with a claim that they were all the time, till the decree of this Court, possessors in good faith, and were to be paid for their works as fully as they enhanced the land in value. (Record, 21, fol. 57, 58.)

The Master reported this claim to the Court and the Court overruled the claim, and directed inquiries upon the assumption that they were possessors in bad faith.

Decretal order, R. 316.

Jackson vs. Ludeling, 2 Wood's C. C., 254.

The question of the good faith of the defendants was entirely disposed of in the opinion and decree of this Court and the mandate to the Circuit Court.

21 Wall., 606.

A possessor in bad faith, under the 508th Article of the Code, can make no claim for compensation or payment from the injured owner. The owner dominates in this settlement. This possessor may be required by him to remove or to demolish the constructions or works at his own cost, without compensation. He may *keep* them contrary to the will of the possessor and then *he owes nothing but the value of the materials and the price of workmanship.* The possessor must await this election of the owners. The opinion of the Circuit Court and its decretal order, were designed to ascertain facts essential to the making of the election. The Master reported that the Exhibit B in the report of Green and Richardson, Record 78, fol. 208, contained a statement of the materials and workmanship of the defendants remaining there, satisfactory to him, and also a statement of their value in 1875. The sum is $347,361.29. That an addition of 25 per cent. would suffice to make up for the variation in prices since the expenditure was made. He reported their cost as $434,201.61. The Court allowed four per cent. for interest for four years, subsequently as the average of interest.

The defendants excepted to the report that 25 per cent. was insufficient; that the fall of prices was from thirty-five to forty per cent., and that such a sum should be added to the actual market value, as found in the report of the Master. (Master's Report, Rec. 316, 317, 318.)

The Circuit Court overruled this exception of the defendants and expressed an opinion on it evincing thought and sound judgment which we extract from the opinion contained in the Record, p. 324, fol. 597–7.

"The next exception of the defendants is that the evidence does not justify the assumption of the Master that the cost of the materials and labor used in making the improvements now remaining upon the road was only twenty-five per cent greater than their present value.

"But two witnesses have been examined upon the subject, Green and Richardson, both engineers and men of experience in the construction of railroads.

"With the exception of the period of the war and the interval of time between December, 1873, and March, 1875—a period of fifteen months—Green had been engaged on the road, either as engineer or receiver, since the summer of 1858. Richardson was also employed on the road as assistant engineer from July, 1869, to May, 1870, when some of the betterments, claimed for by the defendants were put upon the road.

"Green testifies that there has been a general decline in value and prices throughout the entire country. It would probably be 35 or 40 per cent. since 1866.

"In another part of his testimony he says that the same improvements could be made at the date of his deposition, in 1875, at about forty per cent. less than in the years 1866, 1867 and 1868. See pages 17 and 21, Green's deposition.

"Richardson corroborates this statement. See page 16 of his deposition.

"But the depreciated condition of the currency when the improvements were made ought to be taken into consideration. A reference to standard tables shows that during the years 1866, 1867, 1868, 1869 and 1870 the average premium on gold was about thirty-three per cent.

"As the defendants are to be paid for their improvements when treasury notes are only about six per cent. below the par of gold, a deduction should be made for the difference between the present value and the cost of the improvements. I have, after much consideration of the evidence and the public history of the country, come to the conclusion that fifteen per cent. only

should be added to the present value of the improvements in order to arrive at their real cost, at the time they were made, in the present currency of the country.

"The exception that the Master only allowed twenty five per cent. when he should have allowed forty per cent. is overruled."

The Court also concurred in the judgment of the Master in respect to the superior value of this testimony upon this subject. But the decree as rendered by the Court contemporaneously with the opinion being the final decree varies materially from this opinion, nor is there an explanation of any cause for change in the record, and we have none, and only say that we do not impute anything of blame and make no construction or misconstruction involving an opinion of impropriety. The decree was filed the last day and last hour of an exhausting term in midsummer and the discrepancy was not observed as it was pronounced, if the counsel heard it.

The report of Green and Richardson determine the market cash value of the materials to have been in April, 1875, ...	$347,361 29
Fifteen per cent. as the opinion adjudges (is sufficient allowance to attain the cost,) . . .	51,104 14
The cost of materials and workmanship, would be, under the opinion, ...	$398,465 43
Four years of interest at five per cent., . . .	79,693 08
Expenditures, as calculated by the opinion of the Court, ...	$478,158 51
The value of materials and price of workmanship by decree, ...	488,109 54
Four years of interest on the expenditures, . .	97,621 88
The value under the decree principal and interest,	$585,731 42
The variance between opinion and decree, . .	$107,572 91

This difference is felt in all of the calculations. Deducting the excess of earnings over expenses and interest thereon from the two sums the balances are respectively for the decree $391,959.40—under the opinion, $284,959.40. Both of these balances contain an allowance of four years of interest, (20 per cent.) so as to obtain interest on expenditures as allowed in the decree and the opinion. The expenditures were supposed to have been made annually for the things remaining. This charge of interest or any charge is obviously contrary to the terms of Article 508 and has no other foundation, it is manifestly erroneous. The Code says if *the owner keeps the works he owes nothing but* the value of the materials and price of workmanship. How does a claim for *interest* on the first cost of cross-ties, trestle work, bridging, platforms, depots, track-laying appear in an account made up to induce the owner of the land not to require removal or demolition but to keep and pay for them.

The Code says *nothing* of this sort shall be done. He "owes nothing but" and interest is not mentioned and embraced. If the owner's right of election had been reserved the owner would have refused to keep and ordered removal. This election was distinctly refused and the payment of this account provided for in the fifth section of the decree. Part of the account was made by the appropriation of $193,772.14 due to the plaintiffs on the account. The effect of the construction of the Court is to secure for decayed, ruinous, worn out, worthless constructions, which have suffered most from age and exposure, the first cost at a time of inflation or disorder in labor with an accumulation of eight and from one to eight years of interest, an average of four for all. The article of the Code was designed to leave a large latitude almost the dictation of his own terms to the owner of the land. The decision of the Circuit Court subjects him to the spoliator.

The Code recognizes the right of the owner of the land to make his improvements, and does not control his discretion on the sub-

ject, nor allow a *mala fide* possessor to do this. He may require their removal without restraint, or he may compel the owner of the works to transfer them to himself at the value of the materials and price of workmanship, and *nothing* beyond that sum. The Roman law, the French Code, and the Louisiana Code, are harmonious, and so the interpretations on those Codes, to the effect that the ownership of the materials and of the workmanship subject to the conditions of election we have stated, remains with the possessor and are not forfeited. If the owner does not elect to *keep* them, they may be removed or *demolished.*

Baldwin vs. Union In. Co., 2 Rob., 133.

Miller vs. Michaud, 12 Rob., 225.

The Roman law made no provision for the removal of the materials by a *mala fide* possessor, nor for payment of the workmanship, but subjected him to loss unless the constructions should become disintegrated and the materials accessible.

Cooper's Inst., p. 79, sec. 30, book 2d.

The French Code is an improvement, though this article has been subject to adverse criticism. But it is obvious that an interpretation, such as the Circuit Court has made, would be pernicious to the owner of the materials if an election was allowed to the owner, and would be grossly unjust if he were forced to purchase on the terms of this decree. The Scotch have a proverb "Fools big (build) houses and wise men buy them." The English proverb is, "Fools build houses and wise men live in them." It seldom happens that the most successful builder can obtain the value of the materials and price of the workmanship after he has completed the building.

A Code which would favor a possessor under a fraudulent title, and whose possession was a moral and legal wrong, by compelling an owner to pay the expenditures made by the possessor, with interest from their date at the time of eviction for

the fraud, would not fail to be condemned for offering a premium to dishonesty. The property, which is to be paid for under this decree, consists of earthwork, bridging, cross-ties, track-laying, depots, shops, platforms, rolling stock, machines for pile-driving, &c. (Record, Exhibit B., p. 83, fol. 219.)

The language of the Article, which excludes everything but the value of the materials and the cost of the workmanship, has been, in the interpretation of the commentators, held to exclude interest on these values.

2 Aubrey & Rau, Cours de droit Civil, 232.
1 Denisart tit. Ameliorations, p. 495.
38 Dalloz Jur. Gen., p. 271, No. 428, note.

The charges of interest on the expenditures set forth in the decree of the Court, if subtracted from the balance found to be due therein ($391,959.40), would change that balance to $294,329.52.

The sum found to be due, according to the opinion of the Court as we have stated it, would be for the sum of $205,266.34.

II.

THE FOURTH AND FIFTH SECTIONS OF THE DECREE.

The Circuit Court, in its final decree, declares that the plaintiffs in this suit, in the proceedings in this cause, are not to be regarded as owners, nor to represent ownership in any manner so far as the disposition of the constructions and works are to be considered. The owner is the Vicksburg, Shreveport and Texas Railroad Company. The plaintiffs are only mortgagees or shareholders of that Company; not the Company. The conclusion of the Court was, after taking $193,772 (the excess of earnings over receipts) to pay on the account for expenditures and interest for these works, leaving only an actual value of

$153,619.12 not paid for, is the charge of $391,959.40, not upon the constructions and works but upon the proceeds of the sale of this entire property.

The bondholders, as mortgagees, have a right upon all of the the property and each portion of it, till their whole debt be paid, to have it seized and sold for its payment. This seizure and sale must be made by judicial order, and the right of the mortgagees follows the property in any hands to which it may come. If in the hands of a third possessor, the hypothecary action is that the property be withdrawn from this possession and sold. (C. C., 3275, 3282, 3397, 3400, 3405, 3407.) The decree of this Court went to the entire length of a judgment in such an action. The property has been withdrawn from these possessors and placed in the hands of a Receiver of this Court. A decree was made here that the Circuit Court should sell the property and divide the proceeds among the bondholders, creditors and shareholders in their order.

This decree is not yet executed after three years of delay. The inquiry all the time has been as to the ameliorations, constructions and works, and at last the Court decides that the Article of the Code cannot be executed. The defendants have surrendered the mortgaged property and are enjoined from making an assertion of claim or right in it. What is it they have? Some claim to the materials and workmanship of works made by them during their wrongful possession which the owner may keep or may require to be removed. The mortgagee in making his seizure and taking proceedings for sale represents the owner, who is always a party.

The third possessor in good faith under the 3407th Article is allowed to claim expenses and ameliorations where they have enhanced the value of the land, this reclamation is made of the seizing creditor. The *mala fide* possessor has no pretensions, except those contained in the 508th Article of the Code. These too may be disposed of in the suit for seizure or settled after.

In some cases it becomes important to do so that the exact value be ascertained. In all cases the creditor represents the debtor and directs the suit. This is the result of the discussion on this subject.

25 Merlin Rep., Privilege de crèance, sec. v, p. 1, 2.

In this suit the Circuit Court could have complied with the decree of this Court by making the sale, reserving to the purchasers at the sale under the mortgage, who would then be undisputed owners of the property, to settle with these *mala fide* possessors, and to determine whether the works should be removed or kept and paid for by them. This course would not have been erroneous if there had been no other parties in the cause. But when the structure of this suit is examined, the hesitation of the Circuit Court has no real impediment to justify it. The defendants in this suit made use of the mortgage as the instrument to accomplish their aims. With that they struck down the bondholders, stockholders and the corporation, and in their answers disclaimed any subordination to any one of them.

A majority of the directors are grantees in the deed of the Sheriff, and defendants in this suit, answering with Ludeling and his associates. The Vicksburg, Shreveport and Texas Railroad Company is a defendant. Without a Board of Directors, it could not maintain a suit. The bondholders and the stockholders, in the enchained condition of the corporation, and its inability to act efficiently, according to the practice of the Court, have the power to represent its rights of ownership.

The decree of this Court is a judgment on all these rights of ownership. The decree vindicates the rights of the plaintiffs as fit representatives of all the rights opposed to these defendants. The Circuit Court denied the rights of the owners, but then conceded to the possessors interests which the decree of this Court had denied to them.

The Court directed a sale of the entire property, including the improvements. The whole property is to be set up at $833,098.38. If this sum be obtained, the defendants are to be paid $391,959.40. If less than the upset price, the defendants are to share in the proportion, of the last to the first of these values. This decree, to have any show of equity, must exhibit that the defendants' own property, amounting to the sum of three hundred and ninety-one thousand, nine hundred and fifty-nine dollars and forty cents, to be sold in common with the property that is associated in the sale. The opinion and decree of the Court, the Master's report, and the reports of the experts, show this is not the case. It ought also to show that the proportion of values of the respective ownerships was as $391,959.40 to $441,138.98. The only comparison of these values in the Record is in Exhibit A. The whole property, including the constructions and works of the defendants, is found to have a market value of $1,576,479.65, of which the defendants own $347,361.29.

The value of $833,098 is made up upon a different basis for valuation, and the relative values of the property of the plaintiffs and defendants is not in any manner included in it. (Record, 77.) Nor can the relative values be gathered from the details. The plaintiffs assign as erroneous the entire principle upon which the decree has been formed in respect to the constructions and works of the defendants. The plaintiffs are not bound to take them, hold them, nor can they be required to pay for them without their consent. If the Court orders their sale, it must be done with the consent of the defendants, and as their separate property, a property which can have no abiding place on the land of another without his consent. The Court has no authority to force a connection between the owner and those who have invaded his property and built upon it contrary to his will. As independent owners, the defendants have no title to call upon the Court to find them a market for their wares.

The Article 508 of the Code is an anomalous mode of adjusting such difficulties, and must be accepted as a whole. In this decree the portions that are severe to an owner have been visited on the plaintiffs, and the conservative features of the Article have been excluded from the decree.

The fourth section of the decree assigns the additional reason that many of the improvements cannot be removed, and the removal or demolition would destroy the property. A summary of these constructions and works will be found, Record 83, fol. 219. There is no physical impediment to the removal of all that can be identified on the ground. Cross-ties, bridges, depots, platforms, section-houses, rolling stock, chairs, frogs, machines of various kinds, would be greatly diminished in value by a removal; but, it is difficult to understand why they cannot be removed, or that destruction would follow the removal.

The matter that gravels the plaintiffs is, that these constructions and works in their decayed and ruinous condition, should be sold to them at about sixty-five per cent. above their actual value under a judicial order.

The 508th Article of the Civil Code contains no such demand upon the owner. It does not require him to purchase at all, but leaves the matter to his free election.

If it be conceded that there are such impediments to a removal, the answer is, the consequences must be borne by the possessor in bad faith.

The 508th Article applies to plantations, constructions and works which, having been erected with the materials furnished by another, and by his labor or workmanship, can be removed or demolished. It is not difficult to conceive of constructions or works so connected or amalgamated in the property that removal would be impracticable.

The owners and builders of them possessed in bad faith. They knew of the adverse title; they knew of the imperfections of their own; there may have been contrivance, counsel, com-

bination, rapid movements to acquire possession tortiously, surprising the uninformed and the unsuspecting; there may have been at the time contagion of disorder; a malaria of covetousness, stimulating men to an appropriation of the property of others for the uses of a combination or its members, and leading each to say

> Let me, if not by right have lands by wit,
> All with me's meet whereby to fashion it.

Who under the law of Louisiana—or the rule of chancery—or the circumstances of the case must submit to loss or to discomfiture because works and constructions were not judiciously placed under such conditions?

This question we may discuss in a more elaborate brief.

JOHN A. CAMPBELL,
Att'y for Plaintiffs.

EXHIBIT A.

Earnings of Road and other Receipts, from February 3, 1866, to April 13, 1875.

Earnings.	
From February 3, 1866, to December 1, 1866.....	
" December 1, 1866, to September 26, 1868.....	$83,492 02
" From September 26, 1868, to July 2, 1870	60,069 32
" From July 2, 1870, to April 13, 1875.....	836,678 50
Total earnings of road	$930,239 84

Other Receipts.		
Lands sold Geo. C. Waddell.....	$3,874 77	
" " H. P. Stubbs.....	5,000 00	
Total for lands sold.....		$8,874 77

EXHIBIT B.

Condensed Statement of Payments of Money to Defendants and Agents.

	Salaries.	Interest on Loans.	Travelling Expenses.	Rent.	Sundries.	Work done on road.	Totals.
John T. Ludeling	22,622 06	37,755 32	729 00	783 75	74 10		61,964 23
Frank P. Stubbs	6,416 66	14,581 09	1,611 42	490 00			23,099 17
W. R. Gordon	28,391 96	17 719 33	372 00		535 50	2,117 26 828 50	50,064 55
John Ray	4,933 33	11,508 61	1,475 00				17,916 94
George C. Waddell	1,405 00	7,533 97	1,046 90			6,334 79	15,320 66
W. J. Q. Baker		644 83	400 00				1,044 83
Frank Morey		784 79	1,060 00		Land grant 12,214 00		14,058 79
Joseph F. McGuire	23,462 88	538 82 129 76	2,149 71		575 00		26,856 17
Henry M. Bry						27,568 88	27,568 88
Totals	87,231 89	91,196 52	8,844 03	13,498 60	13,498 60	35,849 43	237,894 22

EXHIBIT C.

DECREE.

This cause came on for argument, and was argued by counsel. Whereupon, after due consideration, it is ordered, adjudged and decreed that the decree of the Circuit Court, dismissing the bill of the complainants, be reversed and set aside, and that the bill be reinstated. And it is further ordered and decreed and hereby declared, that the mortgage described in the bill, executed to John Ray, or bearer, is still a valid lien upon all the property described therein not sold or disposed of by the Vicksburg, Shreveport and Texas Railroad Company, before September 23, 1865, and the rights of the holders of bonds *vona fide* issued under the mortgage are hereby set up and maintained, and the holders are authorized to prove their bonds under the decree of this Court, or of the Circuit Court.

And it is further ordered, adjudged and decreed, that the sale made to John T. Ludeling, and his associates, and the adjudication of the Sheriff to them, together with the Sheriff's deed to them, be declared to be fraudulent and void, and be set aside and cancelled, and that a perpetual injunction issue commanding them and all the defendants to refrain from setting up or claiming any right, title, or interest under said sale, or under said deed, and also commanding them, their agents and servants to refrain from selling, or otherwise disposing of any of the property, rights, credits, privileges or effects, covered by or embraced within the mortgage made by the said Vicksburg, Shreveport and Texas Railroad Company.

And it is further ordered, adjudged and decreed, that this cause be remitted to the Circuit Court for the District of Louisiana, with instructions to direct an account to be taken of all the property of the said corporation, and to appoint a Receiver

thereof; and also to order that the property described or mentioned in the said mortgage be sold, under the direction of that Court, for the benefit, first, of all the *bona fide* bondholders secured by the mortgage; and secondly, for the benefit of other creditors of the company and its stockholders, upon such terms as may appear best calculated to promote the interests of all.

And it is further ordered and decreed that the defendants do account for all money and property received by them out of the property so sold to them or any of them, receiving in their account such credits as under the circumstances of the case, by the law of Louisiana, they are entitled to, and that they pay and deliver to the Receiver whatever on such accounting may be found due from them.

And it is ordered and adjudged that the defendants do pay the costs in this Court and in the Circuit Court.

Let a formal decree be prepared.

EXHIBIT D.

AN ACT

To authorize the North Louisiana and Texas Railroad Company to substitute stock of said company instead of second mortgage in favor of the State, and to release the said company from other liabilities to the State.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That in lieu of the second mortgage required by the eleventh section of the charter of the North Louisiana and Texas Railroad Company, to be given to secure the State for the ultimate payment of the bonds of the State, issued in conformity to said charter, or act No. 108 of the session acts of the General Assembly of 1868, the said North Louisiana and Texas Railroad Company may give stock of said company to the State to an amount equal to the aggregate sum of the State bonds issued or to be issued under said charter, or act No. 108 of 1868, to wit, eleven thousand two hundred and twenty shares or eleven hundred and twenty-two thousand dollars of the sixty thousand shares, or six millions of dollars of the capital stock of said company, and in consideration of the issue and delivery of said stock by said company to the State the said North Louisiana and Texas Railroad Company shall be relieved from all liability on the aforesaid bonds of the State, and that on the delivery of the stock aforesaid the remainder of the whole number of bonds authorized to be issued by the aforesaid charter and act No 108, to wit, five hundred and seventy-six bonds of one thousand dollars each, shall be immediately issued and delivered to the president of said company by the Governor of the State.

SEC. 2. *Be it further enacted, etc.,* That within sixty days after the passage of this act the president and directors of the said North Louisiana and Texas Railroad Company shall, at a meeting held for that purpose, adopt all the provisions of this act, a

copy of which resolution or resolutions of adoption shall be delivered to the Governor of the State within ninety days after the passage of this act, who shall file the same in the office of the Secretary of State, and it shall be the duty of the Governor of this State, as soon as the President of said railroad company shall tender to him the certificate or certificates of stock, accord- to the provisions of this act, to cause to be prepared, signed and executed, according to the twelfth section of the charter of said act No. 108 of 1868, the said five hundred and seventy-six thousand dollars of said bonds yet to be issued, and deliver the same to the president of said railroad company, which shall be, with the bonds already issued, payment in full for said stock.

SEC. 3. *Be it further enacted, etc.*, That the Governor shall have the right to appoint annually, on behalf of the State, one of the nine directors now authorized to be elected by the stockholders to represent the interests of the State in said company, the stockholders electing the other eight directors.

SEC. 4. *Be it further enacted, etc.*, That this act shall take effect from and after its passage.

(Signed) O. H. BREWSTER,
Speaker of the House of Representatives.

(Signed) P. B. S. PINCHBACK,
Lieutenant Governor and President of the Senate.

Approved April 10, 1872.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

Supreme Court of United States.

No. 138.

[redacted] Et Al. *versus* HENRY R. JACKSON Et Al.

No. 525.

HENRY R. JACKSON Et Al.

versus

[redacted] LOUISIANA AND TEXAS R. R. CO.

No. 526.

[redacted] LOUISIANA AND TEXAS R. R. CO.

versus

HENRY R. JACKSON Et Al.

Appeal from the Circuit Court of the United States of Louisiana.

J. A. CAMPBELL & E. M. SPOFFORD,
Solicitors for Plaintiffs.

Gibbs & Halliday, Brief Printers, 119 Gravier Street.

Supreme Court of United States.

No. 156.

E. PARSONS ET AL. *versus* HENRY R. JACKSON ET AL.

No. 525.

HENRY R. JACKSON ET AL.

versus

NORTH LOUISIANA AND TEXAS R. R. CO.

No. 526.

NORTH LOUISIANA AND TEXAS R. R. CO.

versus

HENRY R. JACKSON ET AL.

Appeal from the Circuit Court of the United States of Louisiana.

I.

These three causes on the docket of this Court were set down for a hearing and for a decree upon a written application made by the solicitors who represent all the parties on the record.

It was made known to the Supreme Court that the appeals were founded upon objections to the decree in the Circuit Court, and that they were all interested in a concurrent hearing and decision. The undersigned again agree to a hearing on the merits of the decree ren-

dered in the Circuit Court in 1877, and upon any of the orders which affect that decree and enter into it.

II.

A statement of the orders consequent upon the filing of the mandate of the Supreme Court in the Circuit Court.

The records in No. 156 and of 525 and 526 contain on page one the order of the Circuit Court after the mandate was produced. The order contained in the mandate is printed in 21 Wall., p. 632. It is printed in the APPENDIX to the briefs filed in 525 on our part. The consequential orders are, that the cause shall be re-instated to the docket of the Circuit Court; that the sale made to Ludeling and his associates in February, 1866, and the deed of the Sheriff to them be set aside and cancelled, and that an injunction issue restraining each of them from making a claim under them. They should deliver to a receiver who was then appointed by the Circuit Court all of the property comprehended within the terms of the mortgage, which had been established as valid and operative.

That the receiver should file an inventory in, and give a bond to, the Court. These orders were fulfilled, and no question arises out of them.

Besides these orders, the Circuit Court directed a Master of the Court to ascertain the debt due by bonds bona fide issued by the Vicksburg, Shreveport & Texas Railroad Co., and which are secured by the mortgage;

also, to ascertain the property which is subject to the payment of that debt.

2. To take an account under the 5th section of the decree of the Supreme Court, of the money and property received by them out of the property, and to allow such credits as under the circumstances of the case by the law of Louisiana, the defendants weee entitled to.

The duties thus imposed, were performed by the return of reports to the Circuit Court, stating the property held by the receiver was subject to the mortgage; the bonds issued by the railroad corporation (Vicksburg, Shreveport & Texas Railroad Company), which were secured by mortgage; the money and property received by defendants out of the property; a report upon the improvements and ameliorations which remained on the property, and were ready to be surrendered by defendants.

III.

The decree of the Circuit Court to which the appeals refer:

1. The first and second sections of the decree made, declare the mortgage operative, and confirm the master's report of the bonds due, and of the property subject to the debt, and that the plaintiffs are entitled to a sale of this property. The master's report of the bonds *bona fide* issued, excludes the bonds of Parsons and other persons who made an appeal and filed the record, No. 156.

The Circuit Court overruled their exceptions to the master's report—and adopted the report in this final decree as the proper statement of the debt.

2. The Circuit Court ascertained a sum of money for revenues and profits which had been received by the defendants out of the property, and to be accounted for to the plaintiffs as due to them, and ascertained a sum due to the defendants by the plaintiffs for improvements, and these accounts were adjusted and a balance remained in favor of the defendants.

3. The Court ordered a sale of the entire property, decreeing the notice to be given; the manner of conducting the biddings at it; the payments to be made at it by the successful bidder; and that the master should make a report of his acts.

4. The Court determined the proportion in which the plaintiffs and the defendants should divide the money to be paid for the property at the sale—the one party to be paid for account of the mortgage debt, and the other for improvements on the property during the period of their occupation.

5. All questions not disposed of, reserved. We are not aware of any question in the case not disposed of which arises in the record.

That portion of the decree refers to questions which peradventure may arise in respect to the distribution of the proceeds of sale, order of possessisn, and other consequential measures to perfect the judicial administration in the cause.

POINTS AND AUTHORITIES.

I.

All of the appeals made to this Court in the several cases set down for a hearing in the Supreme Court, concurrently, have for their object to correct errors in the final decree of the Court, contained in Record of No. 525, p. 327, fo. 607. This decree embodies all that was done to fulfill the mandate of the Supreme Court, and is a full settlement of the claims of all of the parties to the suit under that decree. That decree is *res judicata*.

Supervisors vs. Kennicutt, 94 U. S. R., 498.

Roberts vs. Cooper, 20 H. 467.

Santa Maria, 10 Wh., 431.

Carpenter vs. Cushman, 121 Mass., 265.

II.

The Case No. 156, finds its fountain of grievance in the first and second sections of the decree aforesaid, p. 327, record 525. The report printed in the record of No. 156, at pp. 4 to 26; the confirmation of which was moved for at p. 27, and was heard on the exceptions, pp. 28 to 30, and which was confirmed, pp. 30, 31, fo's. 77, 78, is the report which is declared to be operative as a declaration of the debt of the Vicksburg, Shreveport & Texas Railroad Company, in sections one and two of the decree, and which debt is the charge on the property, to the exclusion of the appellants in No. 156.

The third, fourth, and fifth sections of this decree, contain all the matters of law and of fact as determined by the Circuit Court, which are the subject of complaint by the appellants in No. 525, or which are referred to in the petition of appeal by the defendant, in No. 526.

The appellants affirm that this decree is a final decree within the meaning of the Revised Statutes of the United States, Section 492.

Railroad Co. vs. Swasey, 23 Wal., 406.

Bronson vs. Railroad Co., 2 Black., 531.

Ketchum vs. Duncan, 96 U. S. R., 632.

In the last case the decree is similar in all respects to this one, and the questions disposed of were of the same character as those which arise here.

The original bill was filed in this cause to accomplish the cancellation of the sale, and the deed to Ludeling and his Associates, to establish the mortgage deed as a subsisting security on the property and franchises of the Vicksburg, Shreveport & Texas Railroad Company, and to appropriate the property and its revenues to the payment of its just debts, and if there were a remainder to divide it among the stockholders; the decree in this Court accomplished an important aim of the bill; the appeals bring before the Court of all the material questions which terminate in the rendition of a final decree and the disposition of the property for the liquidation of the corporation.

Ray vs. Law, 3 Cr. Rep., 179.

Bronson vs. Railroad Co., 2 Black., 524.

III.

The question arising upon the appeal in the Cause No. 156, is whether the rejection of certein bonds which form a part of the series described in the mortgage are a charge on the property. They were carried away by a party of soldiers who sacked the depots and offices of the company; opened its safe and conveyed these bonds away from their custody. They were sold afterwards for a small sum. The bonds were for £225 or $1000; the coupons were for £9 or $40. The President of the company was to endorse upon the bond the place of payment, in New York, New Orleans, London, and that would determine the currency to be paid. The endorsement has not been made, and the Court cannot know whether the gold, silver, treasury notes or other soft money of the United States must be paid, or British gold.

The Circuit Court and Supreme Court of New York, have decided these bonds were not in their existing form negotiable instruments.

Should this Court concur the amount of the bonded debt is fixed by the master's report and the decree of the Circuit Court.

Parsons vs. Vicksburg, S. T. Co., 2 Woods, 141.
Ledwick vs. McKirn, 53 N. Y. R., 307.
Angle vs. Northwestern, 2 Otto, 330.
Foster vs. McKennan, 4 L. R. C. P., 704.
Nance vs. Lary, 5 Ala. R., 370.

☞Special brief in this case.

IV.

The Circuit Court in section three, charged the plaintiffs with $488,109.44 as principal, for expenditures made by the defendants in making the improvements remaining on the land, during their occupation and interest, which amounts to $97,621.88. It is not pretended that these improvements have that value, only it is said they cost the sum charged as principal, and that the expenditures bear interest under the terms of the Code.

The Circuit Court paid to the defendants on account of this charge for expenditures and interest, the sum which it had awarded to the plaintiffs for excess of earnings, over running expenses and maintainance, amounting for principal and interest, $193,772.02; leaving as a balance for these defendants on account of expenditures, $391,959.40, to be paid to them for the property. In making these allowances for improvements remaining to be turned over, the Court confessedly does not consider the actual value. This balance, after the large payment above mentioned has been used, is still $44,598.11, above the value of the improvements as found on examination by experts. Assuming that the Code of Louisiana is to be applied to this case, it may be confidently stated that it affords no sanction for the decree. The Code does not in any case allow any possessor in bad faith any allowance for constructions and works remaining on the ground any price

whatever, unless the owner elects to keep them and to pay for them according to the rule laid down in the Revised Code, Art. 508. The persons entitled to recover the property, because of a superior title, have the option to require the removal of those improvements.

New Orleans vs. Gaines, 15 Wall., 654.

Cannon vs. White, 16 Ann., 85.

Poché vs. Theriot, 23 Ann., 138.

The unconditional and absolute charge of this debt upon the entire property is without support from anything contained in the law of Louisiana.

Nor is there any sanction in the Code for the addition of interest to the value of the materials and price of workmanship. On the contrary, the Code says the owner shall "OWE NOTHING" but these.

The result is a crosstie bought in 1866, and laid down at the cost of one dollar, at the end of ten years in its decayed and rotten condition, is sold for one dollar and fifty cents. A crosstie put down in 1875, cost fifty or sixty cents and is sold for no more.

V.

The Article 508 of the Civil Code, introduced a new rule into the law of France. Prior to the adoption of the Code Napoleon, the common law of France was to be found in the Roman law.

The great jurists of France,—Cujas Domat, Pothier—in expounding the law of property, referred to that law, and that law did not allow the mala fide possessor

anything but the power to remove his materials from the soil. The Code Napoleon, provided a mode by which removal might be avoided at *the option of the owner* and determined the maximum of price. The value of the materials and the price of workmanship is all. The owner shall owe nothing more than this.

Marcadè commenting on this article, says: "At first blush it would seem that the builder in good faith was treated with less consideration than the builder in bad faith But it is not so. The predicament of the builder in bad faith, is by no means so favorable as it might at a hasty glance appear. Even in a case where the owner of the soil is anxious to keep the works constructed on it by a person in bad faith, he may say to this third person, you must let me have these improvements for three thousand dollars; they have cost you six thousand dollars, and are worth four thousand dollars to the land.

If you do not accept my proposition, then take away every thing you have put on my land and restore it to me as you found it.

2 Marcadé, No. 428.

Demolombe echoes this sentiment. In respect to the possession in bad faith, he says, "the owner has the right to compel the removal of the constructions or works without compensation, and may claim damages for any injury. He may say to the possessor that he will not keep them unless the cost is reduced twenty,

thirty or fifty per cent. Obviously, this menace of a compulsory removal by the possessor will put him at the mercy of the owner of the soil. For the removal or demolition of the works might be enormously expensive, and in place of a reduction of one-third or one-half of the cost, he might find after care and expense his loss would be more.

9 Demolombe, de propriété, No. 674.

Accolas coincides. He say, the article is not a master-piece of legislation, and there might have been injustice to the owner of the land, but that the corrective was placed alongside.

The owner might compel the removal of the constructions. 1 Acc. t. 1, pp. 589, 591.

This was so manifest that the defendants insisted in the Court below, that the Court should disregard the Code and find other solution for the questions.

All the objections that the French jurists make to this article, that it is a premium to a mala fide possessor, are verified in the application the Circuit Court made. The result obtained shows that there is a gain to the defendants by the rejection of their claim of havnig been possessors in good faith.

VI.

We proceed to show the accuracy of this statement.

The Circuit Court conceded for the expenditures	$488,109.54
Interest on expenditures	97,621.88
	$585,731.42

Amount brought forward.....	$585,731.41
The charge for earnings over expense which was allowed to plaintiff.....	$161,476.69
Interest.....	32,295.33
The balance for betterments.....	$391,959.60

A possessor in good faith would have been discharged from account of any kind for this sum for earnings amounting to..... $193,959.40

He would have been entitled to compensation for the value of the improvements..... 347,361.40

The clear profit allowed in compensation of fraud is..... $ 44,598.20

VII.

Conceding that the figures of the Circuit Court be correct, and conceding that the Court properly refused the claim to require a removal of the supposed improvements, there then existed on the land improvements to be paid for, costing with interest on expenditures $585,731.42.

The Court appropriated money of the plaintiffs, amounting to the sum of..... $161,476.69

thereto, and leaves a balance of.. ..... $391,959.40

The Court says, this property must all be set up at a specific price of $833,098, and if that price is realized, full payment of that balance is to be made. Should a smaller sum be bid, they are to have a proportion.

It will be seen that, supposing this price be obtained

and no more, the defendants out of the earnings, and the biddings will have been paid the full amount of $585,731.42.

The plaintiffs will receive $441,139. The actual value of the entire property is set down by the experts at $1,576,479.65. Of this sum all of the works of the defendants amount to $347,361.29. The inequality generated by adopting expenditures and interest on expenditures, as the standard by which the claims of defendants are valued, instead of their present value, is augmented by the depreciation of the value of the property as a whole, while the inflated estimate of price is retained, and that price to be paid out of the diminished estimation.

It seems to us that the necessity for a reformation of this decree is made exceedingly clear.

VIII.

If we assume with the Circuit Court that the rule of the 508th Article of the Code be rejected as not adequate to adjust the equities of the case, there are important considerations to be weighed in settling the rule. The article in the Louisiana Code comes literally from the French Code Napoleon.

When that Code was made, the Roman law was in force as the common law on this subject in France, and the article of the Code is only a modification of the Roman law, as expressed in the Institutes of Justinian. No other article provides for any sort of transaction or

settlement between the owner of the soil and a mala fide possessor—nor is there any provision in Louisiana.

We have cited all the relevant cases to be found in the jurisprudence of Louisiana. We find no case there where a fraud has been committed, in which there has been allowed claims for improvements. We refer to these cases found in our brief No. One. The rule on the continent of Europe, where the Roman law exists as the basis, is not changed, and the rule which excludes a tenant because of fraud, prevails in Great Britain and in the United States, as we have shown.

Brief No. One, p. 16.

IX.

In respect to the products and revenues of the property, these are secured by the terms of the Code of Louisiana. From the earliest period in the history of law and the institution of property, the owner has been recognized to have a title to the products and revenues of land.

The title is of the same order and rank as the title to the land itself. The decree that directs a mala fide possessor to restore land directs the restitution of the products and revenues he had received to the owner by the same right—they are accessories or incidents to ownership.

If there were no fruits or capability to produce fruits or revenues, of course, there would be no restitution.

But if the owner or any other person could make

the property productive, the liability attaches to the mala fide possessor who fails to do so.

In this case we have shewn property which cost more than two million of dollars, and which was not damaged, a fifth part of that sum has been withheld from the owners these thirteen years illegally and unjustly, we claim a rent for the occupation commensurate with the value of the property withdrawn from their right of ownership.

J. A. CAMPBELL & H. M. SPOFFORD.
Solicitors for Plaintiffs.